IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

WEDNESDAY, THE 3RD OCTOBER 2007 / 11TH ASWINA 1929

WP(C).No. 5158 of 2007(L)

AGAINST THE ORDER DATED / / IN EP 95/82 IN OS.339/1969 of I ADDL.M.C.,NEYYATTINKARA

PETITIONER:

BINDU RADHAKRISHNAN, W/O.RADHAKRISHNAN, HOUSE NO.4/460K, GOKULAM, KENNEDYMUKKU, EDAPPALLY P.O., COCHIN-24.

BY ADV. SRI.M.M.ABDUL AZIZ (SR.)
SRI.M.A.ABDUL HAKHIM
SRI.JYOTHISH.J.KALLINGAL

RESPONDENTS:

1. **R. VIJAYAMMA, D/O. RADHAMMA, VIJAYAVILASATHU VEEDU, MALAYINKEEZHU DESOM, MALAYINKEEZHU VILLAGE, MALAYINKEEZHU P.O.**

2. **BABURAJ, S/O. MARSHYAL, GOVERNMENT SERVANT, MARUVANCHERI VEEDU, MOOVANKARA DESOM, THAVANNOOR VILLAGE, MALAPPURAM FROM THUMARICHAL BHAVAN, MALAYINKEEZHU DESOM, MALAYINKEEZHU VILLAGE.**

3. **HERBERT MARSHAL, FATHER ST.PAUL LOOTHARANA CHURCH, RAVIPURAM, ERNAKULAM DISTRICT FROM THUMARICHAL DEENA VILASOM, MALAYINKEEZHU DESOM, MALAYINKEEZHU VILLAGE.**

4. **JOYEES, W/O. DEVANESAN, THUMARICHAL NEDUMPURATHU VEEDU, MALAYINKEEZHU DESOM, MALAYINKEEZHU VILLAGE.**

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5. PONNAMMAL MEENAKSHI AMMAL,
HARI BHAVAN, THUMARICHAL, MALAYINKEEZHU DESOM,
MALAYINKEEZHU VILLAGE.

6. V.S. HARI KUMAR, S/O. VASUDEVAN,
HARI BHAVAN, THUMARICHAL, MALAYINKEEZHU DESOM,
MALAYINKEEZHU VILLAGE.

7. N.R. AJITH KUMAR, S/O. MANUVEL,
DEPUTY BANK MANAGER, FRANK HOUSE,
MALAYINKEEZHU DESOM, MALAYINKEEZHU PAKUTHI.

BY ADV. SRI.RAM MOHAN.G.
SRI.G.P.SHINOD
SRI.MANU V.
SRI.K.B.PRADEEP
SRI.R.S.KALKURA
SRI.M.S.KALESH
SRI.HARISH GOPINATH
SRI.V.VINAY MENON
SRI.KIRAN SANKAR
SRI.J.DEVADANAM
SRI.VINOD J.DEV
SRI.PRAMOD J.DEV

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 03/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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W.P.(C) NO.

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE FINAL DECREE IN OS. NO.339/69 OF THE MUNSIFF'S COURT, NEDUMANGAD.

EXT.P2:- COPY OF THE JUDGMENT IN CRP. NO.737/84 OF THE HONOURABLE HIGH COURT OF KERALA.

EXT.P3:- COPY OF THE ORDER IN EA. NO.485/98 OIN EP. NO.95/1982 IN EXT.P1.

EXT.P4:- COPY OF THE JUDGMENT IN CRP. NO.2404/95 OF THIS HONOURABLE COURT.

EXT.P5:- COPY OF THE JUDGMENT DT. IN CRP. NO.2864/02 OF THIS HONOURABLE COURT.

EXT.P6:- COPY OF THE JUDGMENT IN CRP. NO.1646/97 OF THIS HONOURABLE COURT.

EXT.P7:- COPY OF THE COMMON JUDGMENT IN CRP.1645/97 AND CRP.1625/97 OF THIS HONOURABLE COURT.

EXT.P8:- COPY OF THE JUDGMENT IN CRP. 941/99 OF THIS HONOURABLE COURT.

EXT.P10:- COPY OF THE JUDGMENT IN CRP. NO.1214/2000 OF THIS HONOURABLE COURT.

EXT.P11:- COPY OF THE JUDGMENT IN CRP. 445/92 OF THIS HONOURABLE COURT.

EXT.P12:- COPY OF THE JUDGMENT IN CMA. 271/96 OF THIS HONOURABLE COURT.

EXT.P13:- COPY OF THE JUDGMENT IN WPC NO.7538/04 OF THIS HONOURABLE COURT.

EXT.P14:- COPY OF THE PROCEEDINGS OF THE EXECUTION COURT IN OS. NO.339/69.

EXT.P15:- COPY OF THE COMMON JUDGMENT IN WPC NOS. 36888/03 AND 73/04 OF THIS HONOURABLE COURT.

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EXT.P16:- COPY OF THE ORDER TO THE DIRECTOR OF SURVEY, VAZHUTHACUAD, TRIVANDRUM TO DEPUTE A SURVEYOR TO SURVEY AND LOCATE THE DECREE SCHEDULE PROPERTY.

EXT.P17:- COPY OF THE REPORT OF THE SURVEYOR REPORT BEFORE THE EXECUTION COURT INCLUDING 3 ACRES 7 CENTS IN SY. NO.131/8A AND 55 CENTS IN SY.NO.137/2(TOTAL 3 ACRES 62 CENTS) IN THE DECREE SCHECULE PROPERTY.

EXT.P18:- COPY OF THE SURVEY PLAN OF THE DECREE SCHEDULE PROPERTY ATTACHED TO EXT.P17 REPORT.

EXT.P19:- COPY OF THE JUDGMENT IN WPC NO.18767/06 .

EXT.P20:- COPY OF THE ORDER IN EA. NO.554/2006.

EXT.P21:- COPY OF THE REPORT OF THE AMIN WITHOUT AFFECTING THE DELIVERY OF PROPERTY AS PER EXT.P20 ORDER.

EXT.P22:- COPY OF THE CLAIM PETITION , EA. 731/06 FILED RESPONDENT 2 TO 7 UNDER ORDER 21, RULE 97 AND SEC. 151 CPC.

EXT.P23:- COPY OF THE CLAIM PETITION IN EA. 842/06 FILED BY THE 7TH RESPONDENT UNDER ORDER 21 RULE 97 AND SEC. 151 CPC.

EXT.P24:- COPY OF THE ORDER IN EA. 830/06.

EXT.P25:- COPY OF THE ORDER IN EA. NO.946/06.

EXT.P26:- COPY OF THE PROCEEDINGS OF THE EXECUTION COURT IN EP. 95/82.

/TRUE COPY/

P.A. TO JUDGE

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M.N. KRISHNAN, J.

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W.P.C. NO. 5158 OF 2007

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Dated this the 3rd day of October, 2007.

J U D G M E N T

This is a litigation which has now entered into 38th year of fight and in the year 2006 two more claim applications had been filed claiming right and possession over the portion of the decree schedule property. The original suit was one for redemption and possession and it ended in a decree and final decree was passed on 8.10.76. After the passing of the final decree and also when an attempt is made to get possession of the property all things stand in the way whereby it is submitted that the decree holder is not entitled to enjoy the usufructs of the decree even by getting delivery of one cent of property. It is true that in one of the judgments this Court held by virtue of that misfortune and also the necessity for finding the way out for a final decision on the litigation. By virtue of other proceedings as an interim relief the learned Munsiff has ordered to deliver

portion of the property that is ONAMLKJP and QRSTU plots to the decree holder by removing the structures therein. When the Amin went to effect delivery of the property there again arose obstruction which was reported before Court and ultimately Ext.P22 and 23 applications are filed by the claimants contending that the decree schedule takes in a portion of their property over which the decree holder does not have any right or possession and therefore that their claim be adjudicated and delivery stopped forthwith.

2. So far as Ext.P22 application is concerned the claimant therein is claiming right over 6 & 1/8 cents of land with a building therein bearing No.MP 14/306. In Ext.P23 the claimant is raising right over three ares and 24 sq.meters. of property with a building MP II/512-A. They trace right to the property under a document of partition effected in favour of one Rasalamma. It is her case that she got these properties along with other properties by virtue of a partition deed of the year 1120 M.E.(Document No.2891/1120 M.E.) and that title is based subsequently as

per documents No.5580/60, 2829/61 and ultimately as per document No.1490 of 1998. So far as Ext.P22 is concerned the property is claimed by virtue of a document No.525/1989. So, on the facts and circumstances of the case the rights of the claimants have to be adjudicated with respect to their title and possession over the property and in that process to consider whether the decree holder did have valid title and possession over the entire property as decreed by the Court. It is a settled proposition of law that as between the parties when a judgment becomes final the persons claiming under the judgment or their successors in interest or any transferee under them cannot claim a better title and therefore the Court in the light of the provisions under Order 21 Rule 98(2) is competent to order delivery of property. But, when the claim is made by third persons who are not claiming the property through the judgment debtor or under them or under the transferees of them, then it becomes an independent claim which has to be adjudicated under the provisions of law.

3. A comparison of Order 21 Rule 58 and Rules 97 to 103 would show that under Order 21 Rule 58, the Court has the power to summarily reject an application when the Court is convinced that the claim or objection was designed to cause unnecessary delay, but such a position is not seen in any of the provisions under Order 21 Rule 97 to 103 of CPC. I am conscious of the fact that the decree holder who had litigated for 38 years is still waiting in the veranda of the Court to get some reliefs and is faced with applications after applications.

4. The learned counsel for the writ petitioner first canvasses for the position that unless the so called claimants are dispossessed and an adjudication under Order 21 Rule 99 is not contemplated under the provisions of the CPC. It is true that in the decision reported in ***Moidu v. Parthasarathy (1991 (1) KLJ 497)*** a Single Judge of this Court held that obstructor has no right to move the Court under Rule 97 in anticipation of his dispossession.

5. The learned counsel then drew my attention to another decision of the apex Court reported in ***Vijayan v. Kamalakshmi Amma (1994 (1) KLT 942)*** where the Apex Court has condemned the practice of using the courts for delaying the enjoyment of the usufructs of the decree by a party which in other words is termed as abuse of process of Court.

6. Then the learned counsel had also relied on the decision reported in ***Ittiyachan v. Tomy (2001 (3) KLT 117***) wherein this Court held that mere possession by the claimant would not be sufficient, claimant has also to show that a right to possession independent of judgment debtor.

7. The apex Court in the decision reported in ***Brahmdeo Chaudhary (AIR 1997 SC 856)***, considered the question whether an obstructer/stranger has to wait till he is actually dispossessed. The Court held that it cannot be stated that he can get his claim adjudicated only after losing possession. Stranger can get his claim adjudicated even prior to losing possession to the decree holder. So, the

dictum laid down by the Apex Court clinches the matter to the effect that a person whose right is affected need not wait till dispossession is made and held that the claim application can be maintained in such situation. So, in the light of the above decision the contention of the learned Counsel for the writ petitioner cannot be accepted that the claimant can approach the Court only after he is dispossessed.

8. The learned counsel, then would contend that he had taken copies of the encumbrance certificate and none of these certificates show the property claimed by the claimants as belonging to somebody else. He would also contend that they have not produced the original of the documents and from the back history of the case, it is seen that persons file petition one after the other and never permits a finality to the litigation. He submits that the petitioners should be directed to produce the original of the documents in order to pursue their claims. It has to be stated that when a claim petition is filed and an adjudication is necessary under Order 21 Rule 98 or 99 then the procedure contemplated under

Order 21 Rule 101 of CPC has to be followed and that all questions relating to right, title, interest etc. which is arising between the parties has to be adjudicated threadbare just like a suit and by virtue of the provisions under Order 21 Rule 103 it becomes an appealable decree. So a claim petition is filed, what the Code contemplates is a full fledged disposal of the case after considering the entire matter. So far as the production and acceptability of the documents are concerned it is governed by the provisions of the Evidence Act.

9. Now, at this stage I may have to refer to the situation where after the filing of the claim applications, the parties moved for issuance of a Commission and the Court has permitted the same to be done. The learned counsel for the writ petitioners had taken me through the various decisions and the reports and observations in various decisions of the trial court as well as of this Court and would contend for the position that the identity of the property has been established and that is why the delivery is ordered and

therefore there need not be an issuance of a Commission for the said purpose. It is true that as between the parties to the litigation such a consideration and decision has become final and conclusive. So far as the present claimants are concerned they are claiming independent right over the property through their mother by virtue of an anterior document of partition of the year 1120 M.E. and they are also claiming property on the basis of certain documents that are stated in the petition. Since these persons were not parties to the earlier proceedings and as the said decree is not binding on them and at that point of time as there was no dispute between the parties, then the present documents were not taken into consideration for identifying the property or at least to find out whether these properties forms part and parcel of the decree schedule covered under the decree. Therefore, even for the benefit of the decree holder it is absolutely essential to carve out the property which is claimed by the petitioners by virtue of the documents relied upon by them in the claim petition so that the Court will first

get an idea whether the property claimed by the persons forms part of the decree schedule and thereafter in case it is found that it forms part of the decree schedule the Court will be in a position to adjudicate who is having title to the property and it can render a decision. It is true that it is very unfortunate that the plaintiff has been involved in a long drawn litigation without any benefit but at the same time when strangers come forward with petitions claiming independent right over the property, the law mandates adjudication of their right with respect to the title deeds of documents relied upon by them. Therefore, I do not find any material irregularity or illegality committed by the Court below in the issuance of Commission. At the same time I may also like to point out that the Commissioner may be directed to inspect the property at the earliest and with utmost co-operation of the claimants the work be done at the earliest and the matter be disposed of in accordance with law after giving all the parties concerned, that the decree holder as well as the claimant herein, opportunity to adduce

evidence in support of their respective contentions. I also make it clear that claimant shall not unnecessarily attempt to protract the proceedings pending before the Court. I direct the Court below to expedite the trial after reception of the Commissioner's plan and report and dispose it of within a period of two months from the date of receipt of Commissioner's plan and report.

The writ petition is disposed of accordingly.

M.N. KRISHNAN, JUDGE.

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